



DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

42 CFR Parts 406, 407, and 408

[CMS-4176-NR]

Announcement of Ruling: Implementing United States v. Windsor for Purposes of Entitlement and Enrollment in Medicare Hospital Insurance and Supplementary Medical Insurance

AGENCY: Centers for Medicare & Medicaid Services (CMS), HHS.

ACTION: Notice of CMS ruling.

SUMMARY: This document announces a CMS Ruling that states the CMS policies for implementing United States v. Windsor (“Windsor”), in which the Supreme Court held that section 3 of the Defense of Marriage Act (DOMA), enacted in 1996, is unconstitutional. Section 3 of DOMA defined “marriage” and “spouse” as excluding same-sex marriages and same-sex spouses, and effectively precluded the Federal government from recognizing same-sex marriages and spouses.

DATES: The CMS ruling announced in this document is applicable beginning February 9, 2015, with respect to appeals pending on, initiated, or reopened in accordance with applicable rules after February 9, 2015, for entitlement and enrollment determinations made on or after June 26, 2013. This ruling does not apply to appeals of entitlement and enrollment determinations made before June 26, 2013.

FOR FURTHER INFORMATION CONTACT: Patty Helphenstine (410) 786-0622.

SUPPLEMENTARY INFORMATION: In “Windsor,” (570 U.S. 12, 133 S. Ct. 2675 (2013), the Supreme Court held that section 3 of the Defense of Marriage Act (DOMA), enacted in 1996

(codified at 1 U.S.C. 7), is unconstitutional.

The CMS Administrator signed Ruling CMS-4176-R on February 9, 2015. This CMS Ruling, as well as other CMS Rulings are available at <http://www.cms.gov/Regulations-and-Guidance/Guidance/Rulings/index.html>. For the readers' convenience, the text of the CMS Ruling 4176-R is set forth in the Appendix to this notice of CMS ruling.

(Catalog of Federal Domestic Assistance Program No. 93.773, Medicare--Hospital Insurance; and Program No. 93.774, Medicare--Supplementary Medical Insurance Program)

Dated: February 9, 2015

Marilyn Tavenner,
Administrator,
Centers for Medicare & Medicaid Services

APPENDIX

CMS Rulings**Department of Health
and Human Services****Centers for Medicare &
Medicaid Services**

Ruling No.: **CMS-4176-R**Date: **February 9, 2015**

Centers for Medicare & Medicaid Services (CMS) Rulings are decisions of the Administrator of CMS that serve as precedential final opinions, orders and statements of policy and interpretation. They provide clarification and interpretation of complex provisions of the law or regulations relating to Medicare, Medicaid, Utilization and Quality Control Peer Review, private health insurance, and related matters. They are published under the authority of the Administrator.

CMS Rulings are binding on all CMS components, Part A and Part B Medicare Administrative Contractors (MACs), Qualified Independent Contractors (QICs), the Provider Reimbursement Review Board, the Medicare Geographic Classification Review Board, and on the Medicare Appeals Council and Administrative Law Judges (ALJs) who hear Medicare appeals. Rulings promote consistency in interpretation of policy and adjudication of disputes.

This Ruling states the CMS policies for implementing *United States v. Windsor*, 570 U.S. 12, 133 S. Ct. 2675 (2013) (“*Windsor*”), in which the Supreme Court held that section 3 of the Defense of Marriage Act (DOMA), enacted in 1996 (codified at 1 U.S.C. § 7), is unconstitutional. Section 3 of DOMA defined “marriage” and “spouse” as excluding same-sex

marriages and same-sex spouses, and effectively precluded the Federal government from recognizing same-sex marriages and spouses.

MEDICARE PROGRAM

Entitlement and Enrollment in Medicare Hospital Insurance (Part A) and Medicare Supplementary Medical Insurance (Part B)

CITATIONS: Sections 216(h), 226, 226A, 1818(c)-(d), 1837(i) and 1839 of the Social Security Act (42 U.S.C. Sections 416, 426, 426-1, 1395i-2, 1395p and 1395r); 42 C.F.R. §§ 406.5, 406.10, 406.13, 406.24, 406.32(c) – (d), 406.33, 406.34, 407.20, 407.22(a)(5), 407.25(c), 407.27(b), 408.22 and 408.24.

BACKGROUND

Section 3 of the Defense of Marriage Act (DOMA), enacted in 1996 (codified at 1 U.S.C. § 7), defined “marriage” and “spouse” as follows: “The word ‘marriage’ means only a legal union between one man and one woman as husband and wife, and the word ‘spouse’ refers only to a person of the opposite sex who is a husband or a wife.” However, in June 2013, the United States Supreme Court ruled that Section 3 of DOMA is unconstitutional. *United States v. Windsor*, 570 U.S. 12, 133 S. Ct. 2675 (2013) (“*Windsor*”). After the Supreme Court’s opinion in *Windsor*, section 3 of DOMA no longer prohibits the Federal government from recognizing same-sex marriages when administering Federal statutes and programs and no longer controls the definition and recognition of a marital relationship in that context.

Marital status is relevant to certain Medicare entitlements, premiums, benefits, and enrollment provisions. This Ruling provides binding CMS policy for the application of these provisions in the context of a same-sex marriage.

RULING

This Ruling states the CMS policies for implementing *United States v. Windsor*, 570 U.S. 12, 133 S. Ct. 2675 (2013) for purposes of certain entitlement, eligibility and enrollment provisions for Medicare. Note that the rules for recognizing a same-sex marriage (and treatment of a same-sex relationship that is not a marriage) for purposes of eligibility and entitlement controlled by Title II of the Social Security Act (the Act) are different than the rules for recognizing a same-sex marriage (and treatment of a same-sex relationship that is not a marriage) for benefits provided under Title XVIII of the Act.

POLICY

Because section 3 of DOMA is unconstitutional, it no longer defines or controls the recognition of a marital relationship by the Federal government. In the absence of controlling law to the contrary, the Department of Health and Human Services (HHS) has adopted a policy of treating same-sex marriages on the same terms as opposite-sex marriages to the greatest extent reasonably possible and of recognizing marriages between individuals of the same sex who were lawfully married under the law of the state, territory, or foreign jurisdiction where the marriage was entered into (“celebration rule”), regardless of where the couple resides. As a general matter, for determinations made solely under Title II of the Act, we note that rules applicable specifically to Title II of the Act apply. In addition, for determinations made under Title XVIII, we note that rules applicable specifically to Title XVIII of the Act apply.

Title II Provisions

Title II determinations within the scope of this Ruling are eligibility for Medicare based on age or end-stage renal disease under sections 226 and 226A of the Act. Section 216 of the Act explicitly provides the definitions of terms describing the marital relationship and directs recognition and deeming of marital relationships for all of Title II of the Act. As a result, section 216 of the Act is the controlling provision in determining family and marital status for purposes of eligibility for Medicare when eligibility is based on a provision under Title II of the Act.

Section 216(h)(1)(A)(i) explicitly controls recognition of a marriage:

An applicant is the wife, husband, widow, or widower of a fully or currently insured individual for purposes of this subchapter if the courts of the State in which such insured individual is domiciled at the time such applicant files an application, or, if such insured individual is dead, the courts of the State in which he was domiciled at the time of death, or, if such insured individual is or was not so domiciled in any State, the courts of the District of Columbia, would find that such applicant and such insured individual were validly married at the time such applicant files such application or, if such insured individual is dead, at the time he died.

The Social Security Administration (SSA) has issued policies interpreting and implementing section 216 of the Act in the context of same-sex marriages and other relationships. Generally, such policies look to the law of the domicile of the social security number holder to determine whether to recognize a marriage. Such interpretations of section 216(h) are applicable for purposes of entitlement and eligibility determinations under sections 226 and 226A. The SSA has interpreted and directed the application of section 216(h) in the following Program

Operations Manual System (POMS) sections issued by SSA:

- GN 00210.002: Same-Sex Marriage – Determining Marital Status for Title II and Medicare Benefits.
- GN 00210.003: Same-Sex Marriage – Dates States Permitted or Recognized Same-Sex Marriage.
- GN 00210.004: Non-Marital Relationships (Such as Civil Unions and Domestic Partnerships).
- GN 00210.006: Same-Sex Marriages Celebrated in Foreign Jurisdictions.

CMS follows SSA interpretations on the application of section 216(h) to same sex marriages and same sex spouses for purposes of Title II. CMS policy illustrating the application of these policies to determinations made under sections 226 and 226A is articulated in the following POMS sections issued by SSA:

Entitlement under section 226 and 42 C.F.R. §§ 406.5 and 406.10:

- GN 00210.100: Same-Sex Marriage and Non-Marital Legal Relationships - Benefits for Aged Spouses.
- GN 00210.400: Same-Sex Marriage - Benefits for Surviving Spouses.

Entitlement under section 226A and 42 C.F.R. § 406.5 and 406.13:

- GN 00210.705: Same-Sex Marriage – Medicare Based on End-Stage Renal Disease (ESRD).

Title XVIII Provisions

There are no controlling provisions in Title XVIII of the Act or regulations implementing the Title XVIII provisions within the scope of this Ruling that define or direct recognition or deeming of marital relationships. Therefore, CMS has adopted a policy of interpreting sections

1818(d), 1837(i) and 1839 of the Act in a manner that treats same-sex marriages on the same terms as opposite-sex marriages to the greatest extent reasonably possible and uses a celebration rule where possible. “Celebration rule” means that a same-sex marriage is recognized and treated as a lawful marriage (where marital status is relevant to a determination of entitlement) if the same-sex marriage was lawful where and when it occurred. Individuals in non-marital same-sex relationships (such as domestic partnerships or civil unions that are not marriages) are not considered married.

The SSA processes applications and initial eligibility determinations under these statutes by applying CMS policy. CMS policy for the implementation of *Windsor* in the context of these Title XVIII provisions is articulated in the POMS sections issued by the SSA as follows:

Calculation of hospital insurance (Part A) premium under section 1818(d) and 42 C.F.R.

§406.32(c):

- GN 00210.706: Same-Sex Marriage – HI Premium Reduction for Aged and Disabled Individuals.

Eligibility for a special enrollment period based on enrollment in a group health plan by reason of a spouse’s current employment under sections 1818(c) and 1837(i) and 42 C.F.R. §§ 406.24, 407.20, 407.22, 407.25, and 407.27:

- GN 00210.700: Same-Sex Marriage – Eligibility for Medicare Special Enrollment Period (SEP).

Calculation of late enrollment penalty for premium hospital insurance (Premium Part A) and supplemental medical insurance (Part B) under section 1818(c) and 1839 and 42 C.F.R. §§ 406.32(d), 406.33, 406.34, 408.22, and 408.24:

- GN 00210.701: Same-Sex Marriage – Premium Surcharge Rollback.

EFFECTIVE DATE

This Ruling is effective on February 9, 2015, with respect to appeals on, initiated, or reopened in accordance with applicable rules after February 9, 2015, for entitlement and enrollment determinations made on or after June 26, 2013. This ruling does not apply to appeals of entitlement and enrollment determinations made before June 26, 2013.

Dated: February 9, 2015

Marilyn Tavenner,
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Centers for Medicare & Medicaid
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